Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-~~5830~~-99
JJSweeney 5890-99

date:

to: Chief Examination Division, Manhattan District
Attn: CEP Manager, Branch 1, Group 1154
from: District Counsel, Manhattan District, New York

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subject: Taxpayer: [redacted]
EIN: [redacted]
Taxable Years: [redacted], [redacted], [redacted] (Form 1042 Returns)

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This memorandum responds to your request of September 27, 1999 for written advice concerning the proper taxpayer to execute a Form 872, Consent to Extend the Statute of Limitations on Assessment, in connection with Form 1042 returns filed by [redacted] ("[redacted]"), a former subsidiary of [redacted], for the [redacted], [redacted] and [redacted] tax years. You also requested written advice concerning the appropriate language for a Form 872 or other form for the above purpose.

In brief, we conclude that [redacted] ("[redacted]") qualifies as the successor in interest by merger of

[redacted] and, as such, [redacted] is the appropriate party to execute a Form 872 covering the Form 1042 returns filed by [redacted] for the [redacted], [redacted] and [redacted] tax years. We further conclude that you should request [redacted] to consent to extend the statute of limitations on assessment for the above noted Form 1042 returns by also executing Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary, and that as a prerequisite to doing so you should request that [redacted] execute a Transferee Agreement (Form 2045) with the Service.

Facts

During its [redacted] tax years, [redacted], a corporation organized under the laws of Delaware, was a member of an affiliated group of corporations that, under I.R.C. § 1501, filed consolidated income tax returns with [redacted] as the common parent of this group. Also during that period, [redacted] itself filed a Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, for each of its tax years [redacted], [redacted] and [redacted]. Currently, these Form 1042 returns of [redacted] for the [redacted], [redacted], and [redacted] years remain open for assessment under I.R.C. § 6501(c)(4) based on a Form 872 previously executed by [redacted] on [redacted], though the period for assessment under this previously executed Form 872 expires on [redacted].

On [redacted], [redacted] and [redacted], a corporation formed under the laws of New York, executed an Agreement of Plan and Merger (the "Agreement"). Under this Agreement, [redacted] and [redacted] merged under the laws of both New York and Delaware. [redacted] emerged as the surviving corporation upon the merger, and the separate existence of [redacted] ceased thereon. Upon this merger, all of the assets of [redacted], including all of its real, personal and intangible assets, became vested in [redacted]. With respect to the outstanding liabilities of [redacted], [redacted] expressly assumed them pursuant to [redacted] of the Agreement, Certain Effects of Merger, which states in pertinent part:

> [A]ll rights of creditors and all liens upon any property of [redacted] shall thereafter attach to the Surviving Corporation [redacted] and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by the Surviving Corporation [redacted] House].

The Agreement further provided that the shareholders of [redacted]

would surrender their stock and receive in exchange shares in [redacted]. To effect this merger for state law purposes, [redacted] and [redacted] agreed to file certificates of merger with both New York and Delaware.

Shortly thereafter, [redacted] and [redacted] filed, under Section 904 of the Business Corporation Law of New York, a Certificate of Merger, which recited [redacted] as the effective date of this merger. They also filed a certificate of merger in Delaware under General Corporation Law § 252, which similarly identified [redacted] as the effective date of the merger.

After this merger, [redacted] merged at various times with other entities, and [redacted] emerged as the surviving corporation upon each such merger.

Law and Analysis

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

[redacted] is the proper party to execute a consent form for assessment purposes if it is either primarily liable for the debts of [redacted] pursuant to state law or if it is a transferee of [redacted] within the meaning of I.R.C. § 6901. Moreover, it is possible to find that [redacted] bears both primary and transferee liability in this case. See, Turnbull, Inc. v. Commissioner, 373 F.2d 91 (5th Cir. 1967), cert. denied 389 U.S. 842 (1967). This analysis discusses both of these theories of liability and how each applies to this case.

The first issue is whether, under applicable state law, [redacted] bears primary liability for all of the debts and obligations of [redacted]. If [redacted] is so liable, it may execute a Form 872 consent as a successor in interest to [redacted] and bind [redacted] to the same extent as if [redacted] itself executed the consent form. Here, a merger occurred between a Delaware Corporation (i.e. [redacted]) and a New York Corporation (i.e. [redacted]

[redacted], and certificates of merger were filed in both of these states. Accordingly, it is prudent to review the law with respect to mergers in both jurisdictions to determine whether [redacted] bears primary liability for [redacted]'s debts.

In this regard, the Business Corporation Law of New York provides, with respect to a successor (i.e. surviving) corporation to a merger, that it:

> shall assume and be liable for all of the liabilities, obligations and penalties of each of the constituent [fig 1] entities. No liability or obligation due or to become due, claim or demand for any cause existing against any such [fig 2] constituent entity, or any shareholder, member, officer or director thereof, shall be released or impaired by such merger or consolidation. NY Bus Corp § 906(b)(3)(Consol. 1999).

This language has been held to mean that the statutory liability of a successor corporation is for most purposes the same as if it originally acted to create the obligation. Kopitko v. J.T. Flagg Knitting Co., 111 F. Supp. 549 (D.C.N.Y. 1953). Accordingly, we conclude that [redacted] is primarily liable for the debts and obligations of [redacted] under the corporate law of New York.

With respect to the law of Delaware, language similar to that cited from the Business Corporation Law of New York is found in Delaware's General Corporation Law, which states in relevant part that:

> [A]ll rights of creditors and all liens upon any property of any of said constituent corporations shall henceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. Del. Code Ann. tit. 8, § 259 (1998).

Accordingly, under both the corporate law of New York and Delaware, [redacted] as the successor corporation to the merger, bears primary liability for the liabilities of [redacted]. As a result, [redacted] may execute a Form 872 on behalf of [redacted] for its [redacted], [redacted] and [redacted] Form 1042 returns, and [redacted] should be referred to in this Form 872 as follows: "[redacted] (EIN [redacted]), as successor in interest by merger, of [redacted] (EIN [redacted])." With respect to the kind of tax subject to assessment under this Form 872, it should state "withholding tax imposed under I.R.C. § 1441-1446" and that a "Form 1042" is the return

held open for assessment (Form language referencing income tax should be crossed-out).

The second issue is whether [redacted] is also a transferee of the assets of [redacted] under I.R.C. § 6901 and whether it can therefore sign a consent form for assessment in that capacity. Under that section, transferee liability can be imposed in either law or equity. Id. In either case, the Service bears the burden to prove that a party should be held liable in the capacity of a transferee. I.R.C. § 6902.

One way in which transferee liability in law[1] may be proven is to establish that a transferee of assets by merger agreed under contract to pay the liabilities of the transferor. Southern Pacific Transportation Company v. Commissioner, 84 T.C. 367 (1985), later proceeding, 90 T.C. 771 (1988). In Southern, the Court determined that the successor corporation to a merger had in the merger agreement expressly assumed all of the liabilities of the corporation that dissolved upon the merger. The Court held that this fact, by itself, rendered the successor corporation liable as a transferee at law for the debts of the dissolved corporation.

In this case, we conclude that [redacted] expressly assumed the debts of [redacted] through the language in the merger agreement stating that the claims of creditors and liens of [redacted] would attach to [redacted] and be enforced against it to the same extent as if [redacted] had incurred the liability. Accordingly, [redacted] should be regarded as a transferee of [redacted] and can in that capacity consent to extend the statute of limitations on behalf of [redacted].

For that purpose, you should request for [redacted] to execute Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary. On this form, [redacted] (its full name followed by its EIN) should be identified as the transferee (above line entitled "name"). The type of tax applicable should be identified as "withholding tax imposed under I.R.C. § 1441-1446", and you should note that "Form 1042" is at issue for the

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[1] To establish transferee liability in equity, the Service must show that, among other things, the transferor was insolvent, or was rendered insolvent, upon the transfer of assets to the transferee. William D. Elliot, Federal Tax Collections, Liens, and Levies, § 18.03 (2nd Ed. 1995). No such evidence has been presented in this case, and further discussion of this theory of transferee liability has therefore been omitted.

applicable years. (Form language referencing income tax should be crossed-out). You should also add a footnote to identify [redacted] as the transferee. In this footnote, please show the full name of [redacted] followed by its EIN.

To accompany this Form 977, you should also request for [redacted] to execute a Transferee Agreement (Form 2045) with the Service. This agreement, when executed according to the language included on Form 2045, has been held to constitute an admission by the party signing as transferee that it in fact qualifies as a transferee of the transferor also identified on the Form. Turnbull Inc., 373 F.2d at 94. Accordingly, although we believe that the merger agreement establishes [redacted] as a transferee of [redacted] this Form 2045 should be executed to establish additional evidence of [redacted]'s transferee status[2].

When preparing this Transferee Agreement, you can identify the type of tax similar to that discussed above with respect to the Form 872 and Form 2045 to execute. Please include the respective EINs of [redacted] as transferor and [redacted] as transferee. When identifying [redacted] in the section near the bottom of the form entitled "Name(If a corporation)", please list its name as follows: "[redacted], as transferee of all of the assets of [redacted], by merger and by agreement made herein."

Please note that if a statutory notice of deficiency is issued with respect to any of the Form 1042 returns discussed herein, separate notices should be issued to [redacted] as successor in interest to [redacted] and to [redacted] as a transferee of [redacted].

If you have any questions concerning the advice provided in this memorandum, please contact Frederick Petrino at (212) 264-1595, ext. 294, or John Sweeney at ext. 263. We will retain our

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[2] This is an important procedure to follow given the Service's burden under I.R.C. § 6902 to prove that a party should be held liable as a transferee.

files in connection with this case pending any request from you for further assistance.

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District Counsel

By: _____
PETER J. LABELLE
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